80-1479

Office-Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

October Term, 1980
No.

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA BOARD OF PROBATION AND PAROLE,

Petitioner

v.

PURCELL BRONSON,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTION PRESENTED

Does an indigent have a federal constitutional right to appointed counsel on appeal from the revocation of his parole?

LIST OF PARTIES

1. Purcell Bronson, Appellant below.

2. Commonwealth of Pennsylvania, Pennsylvania Board of Probation and Parole, Appellee below.

3. Defender Association of Philadelphia, Amicus Curiae below.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. ————

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA BOARD OF PROBATION AND PAROLE,
Petitioner

v.

PURCELL BRONSON,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

The Petitioner, Commonwealth of Pennsylvania, Pennsylvania Board of Probation and Parole, respectfully requests that a writ of certiorari issue to review a judgment of the Supreme Court of Pennsylvania in this case.

OPINION BELOW

The opinion of the Supreme Court of Pennsylvania (Appendix F) is reported at Pa. , 421 A.2d 1021 (1980).

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on March 20, 1980. A timely petition for rehearing was denied on November 14, 1980. This petition is filed within the time permitted. This Court's jurisdiction is invoked under 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. XIV, §1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent, Purcell Bronson (hereinafter Bronson), was sentenced on November 15, 1973 to a term of two to four years for Assault by a Prisoner. While on parole from the original sentence, Bronson was convicted of a new offense on September 6, 1977. After a parole revocation hearing on April 16, 1978 before the Pennsylvania Board of Probation and Parole (hereinafter Board), at which Bronson was represented by counsel, Bronson's parole was revoked solely on the basis of the new criminal conviction.

On or about June 15, 1978, Bronson filed a petition for review[1] with the Commonwealth Court of Pennsylvania contesting the recommitment order on the ground that his parole revocation hearing was untimely. The Commonwealth Court affirmed the order of the Board by its opinion dated October 27, 1978 (Appendix A). Bronson did not appeal the Commonwealth Court's order to the Pennsylvania Supreme Court. On December 29, 1978 Bronson filed a second petition for review in the Commonwealth Court, again on the ground that his parole revocation hearing was untimely. The Commonwealth Court by order dated January 4, 1979 (Appendix B) dismissed this second

[1] The petition for review is the exclusive procedure for judicial review of a government unit in Pennsylvania. See Pennsylvania Rule of Appellate Procedure (Pa. R.A.P.) 1502 and particularly the note thereto. Depending on the applicable law, questions raised by a petition for review may be determined in whole or in part on the record made before the reviewing court or may be determined solely on the record made before the government unit. See Pa. R.A.P. 1515, 1542(b) and 1551.

petition on the ground that it stemmed from the same operative facts as the first petition.

Bronson appealed this dismissal of his second petition to the Pennsylvania Supreme Court. Bronson also asked that the court appoint appellate counsel. On July 9, 1979, the Pennsylvania Supreme Court remanded the question of Bronson's entitlement to appointed counsel to the Commonwealth Court for its consideration (Appendix C). On July 16, 1979, the Commonwealth Court concluded that there was no constitutional right to the appointment of counsel (Appendix D). The Pennsylvania Supreme Court, by order dated September 4, 1979 (Appendix E), granted the Defender Association of Philadelphia leave to present oral argument as amicus curiae under Pa. R.A.P. 531.

On March 20, 1980, the Pennsylvania Supreme Court reversed and remanded the cause to the Commonwealth Court for a counseled appeal (Appendix F).[2] In holding that an indigent has a right to appointed counsel on appeal to the Commonwealth Court[3] from the revocation of his parole, the Pennsylvania Supreme Court relied exclusively

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[2] Most of the opinion of the Pennsylvania Supreme Court (Appendix F) is devoted to resolving the State law question of the procedural nature of judicial review of a Board revocation of parole. On the State law question the court held that an action in the Commonwealth Court seeking judicial review of a Board revocation of parole was a direct appeal from an administrative agency rather than a civil action in the nature of mandamus. Petitioner does not seek review of this determination but rather presents only a federal question to this Court. That federal question is: Does an indigent have a federal constitutional right to appointed counsel on appeal from the revocation of his parole?

[3] This issue was first raised by the amicus curiae. Bronson, on the other hand, had requested counsel only before the Pennsylvania Supreme Court.

on the United States Constitution.[4] The Board filed a timely application for reargument, again contending that there exists no federal constitutional right to appointed counsel on such appeals. The Pennsylvania Supreme Court denied reargument on November 14, 1980 without opinion (Appendix G).

By this petition, the Board seeks review of the order of the Pennsylvania Supreme Court dated March 20, 1980, only insofar as it requires the appointment of counsel in an appeal from the revocation of a parole. This requirement was based entirely on federal grounds and, therefore, may properly be reviewed by this Court.

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[4] While not specifically referring to the United States Constitution, the court relied exclusively on a decision of this Court on a federal constitutional question and on Pennsylvania cases interpreting that decision.

REASONS FOR GRANTING THE WRIT

The Pennsylvania Supreme Court Has Rendered an Erroneous Decision on a Substantial and Unsettled Federal Question Arising Under the Constitution Without Any Independent State Grounds and That Decision Conflicts in Principle With the Decision of This Court in Gagnon v. Scarpelli, 441 U.S. 778 (1973)

In holding that an indigent has a federal constitutional right to appointed counsel on appeal from the revocation of his parole, the Pennsylvania Supreme Court has rendered an erroneous decision on a substantial and unsettled federal question arising under the Constitution which conflicts in principle with *Gagnon v. Scarpelli,* 411 U.S. 778 (1973). The Pennsylvania Supreme Court offered no independent state grounds for its holding that all indigent parolees are entitled to appointed counsel on appeal from parole revocation hearings. Rather, the court relied exclusively on *Douglas v. California,* 372 U.S. 353 (1963), which held that an indigent criminal defendant has a federal right to appointed counsel on his first appeal as of right from his conviction. *Douglas* does not support the proposition that indigents have a federal due process right to appointed counsel on appeal from a parole revocation hearing any more than *Gideon v. Wainwright,* 372 U.S. 335 (1963) (an indigent criminal defendant has a federal constitutional right to appointed trial counsel), supports the proposition that indigents have a federal due process right to appointed counsel at a parole revocation hearing. To the con-

trary, this Court has expressly refused to apply the rule of *Gideon* to parole revocation hearings. *Gagnon, supra* at 788.

Gagnon, cited with approval in *Vitek v. Jones,* 445 U.S. 480 (1980) (involuntary transfer of convict to mental hospital for treatment of mental disease or defect), *Middendorf v. Henry,* 425 U.S. 25 (1976) (summary court-martial), and *Wolff v. McDonald,* 418 U.S. 539 (1974) (prison discipline), holds that a State is under no constitutional duty to provide counsel for indigents at a parole revocation hearing except in limited circumstances.[5] In *Gagnon,* this Court stated that "the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings. . . ." *Gagnon, supra* at 790.

If the presence and participation of counsel is "both undesirable and constitutionally unnecessary in most revocation hearings," *Gagnon, supra* at 790, then the presence and participation of counsel is no more desirable or necessary in appeals from parole revocation hearings. Since an indigent has a due process right to appointed counsel at a parole revocation hearing only in certain limited circumstances, then it must follow that an indigent's federal due process right to appointed counsel at an appeal from a parole revocation hearing must be at least

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[5] Those circumstances include a request for counsel by the parolee based on a timely and colorable claim that he has not committed the alleged parole violation or the presence of substantial reasons which justify or mitigate the violation and make revocation inappropriate where the reasons are complex or otherwise difficult to develop or present. Another relevant circumstance is the apparent inability of a parolee to speak effectively for himself. *Gagnon, supra* at 790-91.

as limited, if such a federal right exists at all. Certainly, a parolee has a much greater need for counsel at the parole revocation hearing itself, where the record for an appeal is made, then he does for counsel on appeal from the revocation of his parole based on the evidence adduced at the parole revocation hearing.

To require all fifty states to provide appointed counsel to all indigent parolees on appeal from their parole revocations would be an ineffectual use of the States's funds given the fact that the record for appeal is made in the absence of counsel and given the "predictive and discretionary" role of the parole hearing body. *Gagnon, supra* at 787; *see Morrissey v. Brewer,* 408 U.S. 471 (1972). A State may consider economic factors in choosing the methods used to provide meaningful access to an appellate court, such as prison libraries and "jailhouse lawyers." *Bounds v. Smith,* 430 U.S. 817, 825 (1977).

Accordingly, the holding of the lower court involves a substantial question of federal law not before this Court in *Gagnon* which this Court should decide now.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Pennsylvania.

Respectfully submitted,

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Deputy Attorney General
ROBERT A. GREEVY
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Assistant Chief Counsel, Pennsylvania Board of Probation and Parole
Attorneys for Petitioner

Dated: February 5, 1981

APPENDIX

A. OPINION OF THE COMMONWEALTH COURT OF PENNSYLVANIA

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 60 Misc. Dkt. No. 2

PURCELL BRONSON,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, BOARD OF PROBATION AND PAROLE AND JULIUS T. CUYLER, SUPERINTENDENT OF STATE CORRECTIONAL INSTITUTION AT GRATERFORD, PENNSYLVANIA,

Respondents

Before:

HONORABLE JAMES S. BOWMAN, President Judge
HONORABLE JAMES C. CRUMLISH, JR., Judge
HONORABLE ROY WILKINSON, JR., Judge
HONORABLE GLENN E. MENCER, Judge
HONORABLE THEODORE O. ROGERS, Judge
HONORABLE GENEVIEVE BLATT, Judge
HONORABLE RICHARD DiSALLE, Judge
HONORABLE DAVID W. CRAIG, Judge
HONORABLE JAMES A. MacPHAIL, Judge

SUBMITTED ON BRIEFS

OPINION

Opinion by Judge Wilkinson, Jr., filed October 27, 1978.

Petitioner has filed a petition for review challenging the decision of the Pennsylvania Board of Probation and Parole (Board) to recommit him to prison as a convicted parole violator. The case is before us now on cross-motions for summary judgment. We will grant the Board's motion and deny the motion for summary judgment filed by petitioner.

The facts are not in dispute. While on parole, petitioner was convicted on September 6, 1977, of facilitating escape and aggravated assault. On December 2, 1977, petitioner was moved to the state correctional facility at Graterford; official notification of petitioner's conviction was received by the Board on December 13, 1977. A full revocation hearing was afforded petitioner on April 6, 1978.

The only issue raised by the petition concerns the timeliness of the revocation hearing. The law in this area is now firmly settled following the decision in *United States ex rel. Burgess v. Lindsey*, 395 F. Supp. 404 (E.D. Pa. 1975), and its aftermath.[1]

This Court has had the opportunity to pass on this precise issue a number of times since *Burgess, supra*,[2] most recently in *Rothman v. Pennsylvania Board of Pro-*

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[1] For the current Board regulation on this point see 37 Pa. Code §71.4(2)(i).

[2] *Terrell v. Jacobs*, Pa. Commonwealth Ct. , A.2d (12 Misc. Dkt. No. 2, filed September 6, 1978); *Alger v. Zaccagni*, Pa. Commonwealth Ct. , 388 A.2d 769 (1978); *Gant v. Pennsylvania Board of Probation and Parole*, 32 Pa. Commonwealth Ct. 627, 380 A.2d 510 (1977).

bation and Parole, Pa. Commonwealth Ct. , A.2d (25 Misc. Dkt. No. 2, filed October 24, 1978); *Thomas v. Pennsylvania Board of Probation and Parole,* Pa. Commonwealth Ct. , A.2d (No. 286 Misc. Dkt., filed September 25, 1978). To pass constitutional muster a convicted parole violator must be given a full revocation hearing within 120 days of the Board's receipt of official verification of guilt. Measuring, as we must, from the crucial date of notification, December 13, 1977, petitioner's hearing on April 6, 1978, falls within the required 120 day period.

Accordingly, we will enter the following

ORDER

AND NOW, this 27th day of October, 1978, the motion of the Pennsylvania Board of Probation and Parole for summary judgment is hereby granted, and the motion of petitioner for summary judgment is hereby denied.

(s) Roy Wilkinson, Jr.
Roy Wilkinson, Jr., Judge

B. PER CURIAM ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 141 Misc. Dkt. No. 2

PURCELL BRONSON,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA BOARD OF PROBATION AND PAROLE et al.,

Respondents

ORDER

PER CURIAM

NOW, January 4, 1979, upon consideration of the above petition for review, which petition challenges the timeliness of petitioner's parole revocation hearing, it appearing that the petition stems from the same operative facts as the petition for review filed at No. 60 Misc. Dkt. No. 2, said petition is hereby dismissed. *See Bronson v. Board of Probation and Parole,* Pa. Commonwealth Ct. , 392 A.2d 916 (1978).

C. ORDER OF THE SUPREME COURT OF PENNSYLVANIA

IN THE SUPREME COURT OF PENNSYLVANIA
In and for the Eastern District

No. 213 January Term, 1979

PURCELL BRONSON, Appellant

v.

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA BOARD OF PROBATION AND PAROLE, RECORD OFFICE FOR BUREAU OF CORRECTION AT GRATERFORD PRISON, et al.

Appeal from the Order of 1/4/79
Court of Commonwealth Court
for the County of
No. 141 Misc. Docket No. 2 *Term,* 19

7/3/79—Petition for Appointment of Appellate Counsel
7/9/79—ORDER: Petition is remanded to the trial court for consideration & determination. s/M. J. Eagen, Chief Justice.

True Copy From Record

In Testimony Whereof, I have hereunto set my hand and the seal of said Court, at Philadelphia, this Tenth day of July 1979.

Sally Mrvos (Seal)
Prothonotary

D. MEMORANDUM ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 141 Misc. Dkt. No. 2

PURCELL BRONSON,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA BOARD OF PROBATION AND PAROLE AND RECORD/ASSESSMENT UNIT OF GRATERFORD PRISON,

Respondents

MEMORANDUM ORDER

By Order dated January 4, 1979, petitioner's petition for review was dismissed for the reason that the issues raised therein had previously been decided by this Court in *Bronson v. Board of Probation and Parole,* 38 Pa. Commonwealth Ct. 294, 392 A.2d 916 (1978). Bronson has appealed our Order of January 4, 1979 to the Supreme Court of Pennsylvania and on July 3, 1979, filed with that Court a petition for appointment of appellate counsel. By

Order dated July 9, 1979, the Supreme Court remanded Bronson's petition to this Court "for consideration and determination".

Bronson's action in this Court was a civil action in the nature of a complaint in mandamus brought within our original jurisdiction pursuant to 42 Pa. C.S. §761. The action was commenced by a petition for review as required by Pa. R.A.P. 1502. In processing the petition for review[1] it became apparent that its critical factual averments in support of the cause alleged were substantially the same as those averred upon a prior cause of action heretofore decided by this Court on the cause of action there asserted, *Bronson v. Board of Probation and Parole, supra.* As we have not received a notice of appeal from the order in that case we assume no appeal was taken. Accordingly, we dismissed the instant action.

We are aware of no constitutional right to the appointment of appellate counsel in a civil proceedings. Nor do we, apart from constitutional consideration, perceive a need in petitioner for appellate counsel in this particular case. All too frequently, this Court, within its original jurisdiction, is subjected to repeated efforts by prisoners to relitigate issues on substantially the same facts as in causes previously decided. This case is one such case.

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[1] All petitions for review in the nature of an action in mandamus or equity filed in this Court by prisoners or parolees directed against the Pennsylvania Board of Probation and Parole or Bureau of Correction officials are processed by the administrative staff of the Court and the President Judge to pass upon forma pauperis applications, to provide by order of Court for service of the petition and for other purposes such as further attempts to litigate issues therefore decided and frivolity.

As we do not presume to usurp the practice and procedure in matters before the Supreme Court, we hesitate to pass upon the petition for appointment of appellate counsel. We do so, however, in light of the remand Order of the Supreme Court of July 9, 1979. Accordingly, we issue the following

ORDER

NOW, July 16, 1979, petitioner's petition for appointment of appellate counsel is denied.

The Chief Clerk is directed to mail a copy of this Order to the Prothonotary of the Supreme Court of Pennsylvania and to the parties.

BY THE COURT:
(s) James S. Bowman
P. J.

E. LETTER ADVISING AMICUS CURIAE OF ORDER GRANTING PETITION

SUPREME COURT OF PENNSYLVANIA
Eastern District

September 11, 1979

John W. Packel, Esquire
Benjamin Lerner, Esquire
Defender Association of Philadelphia
121 North Broad Street
Philadelphia, PA 19107

Re: Purcell Bronson, Appellant v. Commonwealth of Pennsylvania, Pennsylvania Board of Probation and Parole, et al. No. 213 January Term, 1979

Dear Sirs:

This is to advise you that the following Order has been endorsed on your Petition for Permission to File an Amicus Curiae Brief, Participate in Oral Argument and Proceed in Forma Pauperis, filed in the above-captioned matter:

"9/4/79
Petition is granted.
s/ M. J. Eagen
Chief Justice"

Very truly yours,
(s) Sally Mrvos
Sally Mrvos
Prothonotary

SM: jh
cc: Mr. Purcell Bronson
Robert A. Greevy, Esquire

F. OPINION OF THE SUPREME COURT OF PENNSYLVANIA

IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

No. 213 January Term, 1979

PURCELL BRONSON,

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA, BOARD OF PROBATION AND PAROLE

Appeal from the Order of the Commonwealth Court of Pennsylvania at 141 Miscellaneous Docket No. 2 denying a Petition for Review of an action by the Pennsylvania Board of Probation and Parole revoking Appellant's parole at Indictment No. 3287, April Term, 1971, of Allegheny County.

OPINION

NIX, J., filed: Mar. 20, 1980

The underlying issue in this appeal is the right of an indigent prisoner, confined as a result of a parole violation determination by the Pennsylvania Board of Probation and Parole, to have counsel provided to assist him in his attempt to challenge the validity of that determination.

The inadequate and confusing record before us provides the strongest possible argument for the need of counsel in such proceedings. It would be virtually impossible from the information provided by this record to not only assess the merits of appellant's complaints relating to his recommitment but even to identify, with any degree of certainty, the precise nature of appellant's complaints.[1] The appellee argues that there is no right to appointed counsel because the proceeding was civil in nature and did not involve an attack on the convictions or the sentence.

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[1] The Board has interpreted appellant's complaint as being directed to the timeliness of the revocation hearing. In his first petition to the Commonwealth Court, appellant set forth his complaints as follows:

As grounds for said motion it is averred:

(1) That your petitioner is being illegally and unlawfully detained in the above named institution in violation of his constitutional right to due process and the equal protection of law.

(2) That the allegations are:

(a) Petitioner's commitment as a parole violator is in direct violation of 37 Pa. Code sec. 71.4(1).

(b) Petitioner's commitment as a parole violator is in direct violation of the equal protection and due process clause of the Fourteenth Amendment to the United States Constitution.

(c) That petitioner was denied his right to a speedy parole revocation hearing.

(d) That petitioner's parole agent was negligent.

In his second petition, the following allegations were made:

2. The allegations are:

(a) Petitioner was denied his Fourteenth Amendment right to procedural due process of law by respondents.

(b) Petitioner's parole agent was negligent in performing his function as petitioner's agent pursuant to Title 37 Pa. Code Section 71.4(1).

The pertinent facts for a determination as to the right of counsel are as follows: Bronson was sentenced on November 15, 1973 by the Court of Common Pleas, Allegheny County, to serve a two to four year sentence charging assault by prisoner. While on parole from the original sentence, appellant was sentenced in September 1977 on new charges, arising in Delaware County, to a term of imprisonment of two to four years. After a proceeding before the Board, during which it is disputed whether appellant was represented by counsel, his parole was revoked and he was recommitted to serve the balance of his original sentence. Appellant filed with the Commonwealth Court contesting the recommitment order. *Bronson v. Brd. of Probation and Parole,* 38 Pa. Commw. 294, 392 A.2d 916 (1978). The Commonwealth Court, treating the question as relating only to the 120 day rule, *see U.S. ex rel. Burgess v. Lindsey,* 395 F. Supp. 404 (E.D. Pa. 1975) held that the revocation hearing was timely and granted the Board's motion for summary judgment. Appellant was not represented in this proceeding. On December 29, 1978, appellant again applied to the Commonwealth Court for relief and this request was also denied. In this action, appellant also proceeded without

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(c) Title 37 Section 71.4 et seq. is violative of the 14th Amendment to the United States Constitution and procedural safeguards mandated by Morrissey v. Brewer, 408 U.S. 471, in that it is discriminatory in nature.

(d) Petitioner was denied procedural due process by respondent Graterford Record/Assessment Unit at a recommitment proceeding held on March 7, 1978 at Graterford Prison.

It is therefore clear that, although the timeliness of the revocation hearing was one of the issues raised, it was not the sole issue being relied upon.

the benefit of counsel. An appeal from the second denial of relief by the Commonwealth Court has been made to this Court.[2] Because of the confusing state of the record and appellant's request for the appointment of counsel to assist him, we remanded the question of appellant's entitlement to court appointed counsel to the Commonwealth Court for their consideration. In response the Commonwealth Court concluded that there was no constitutional right to the appointment of counsel nor was there a need for counsel, apart from constitutional considerations, in this particular instance.[3] The matter is now before us for decision.[4]

The Commonwealth Court treated Bronson's "Petition for Review" as a civil action in the nature of a complaint in mandamus brought within the court's original jurisdiction pursuant to 42 Pa. C.S.A. 761. Thus to determine the soundness of the Commonwealth Court's result, it is appropriate to begin with examining the initial

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[2] §724(a). Whether this was a mandatory or discretionary appeal was one of the collateral issues before us. For reasons that will be discussed *infra* we have concluded that the instant appeal is a discretionary one pursuant to the Act of July 9, 1976, P.L. 586, No. 142, §2; 42 Pa. C.S.A. §724(a). We, therefore, have treated Bronson's filings in this Court as a request for an allowance of appeal and granted that request.

[3] The Commonwealth Court focused only upon Bronson's right to be represented in the present appeal, this position is supported by the appellee. The amicus extended the question as to Bronson's rights to representation in the proceedings before the Commonwealth Court.

[4] On September 4, 1979, we granted a petition filed by the Philadelphia Defender Association allowing them to file an Amicus Curiae brief and to participate in oral argument on the question of Bronson's right to counsel.

premise that appellant's complaint was an action in the nature of mandamus.

A mandamus is an extraordinary writ of common law, designed to compel performance of a ministerial act or mandatory duty where there exists a clear legal right in the plaintiff, a corresponding duty in the defendant, and want of any other adequate and appropriate remedy. *Philadelphia Newspaper, Inc. v. Jerome,* 478 Pa. 484, 387 A.2d 425 (1978). A court of law of competent jurisdiction issues a mandamus to a public official, board or municipality directing them to perform a particular duty which results from their official station or operation of law. *Goodman v. Meade,* 162 Pa. Super. 587, 60 A.2d 577 (1948). A mandamus will not lie to compel discretionary acts, *Paige v. Pa. Bd. of Parole,* 311 F. Supp. 946 (E.D. Pa. 1970), nor will it be issued to restrain official activities. *Board of Com'r. of Potter County v. Turner,* 33 Pa. Commw. Ct. 639, 382 A.2d 1248 (1978). A proceeding in mandamus is available to compel the Board of Probation and Parole to conduct a hearing or correct a mistake in applying the law. *Davis v. Pa. Bd. of Parole,* Pa. , 398 A. 2d 992 (1979); *Moore v. Roth,* 231 Pa. Super. 464, 331 A.2d 509 (1974).

In *Williams v. Board of Probation & Parole,* 2 Pa. Commw. Ct. 312, A.2d (1971), a recommitted parole violator brought a mandamus action against the Pa. Bd. of Probation and Parole. The plaintiff alleged that the Board erred as a matter of law in denying him "street time" served on parole. Before overruling the Board's preliminary objection to the complaint, the then recently formed Commonwealth Court found it necessary to explain its jurisdiction over the matter. The Appellate Court Jurisdiction Act, Act of July 31, 1970, P.L. 673,

§401, 17 P.S. §211.401,[5] gave the Commonwealth Court original jurisdiction over all civil actions or proceeding against the Commonwealth. Since the plaintiff alleged an error in applying the law and requested a mandamus against a state agency, the court reasoned that the complaint was within its original jurisdiction.

Here, without analyzing the substance of appellant's petitions for review, the Commonwealth Court summarily assumed that they were complaints in the nature of mandamus within the court's original jurisdiction. In his uncounseled petitions, appellant prays for relief from the illegal and unlawful detention "in violation of his constitutional rights to due process and equal protection." The substance of appellant's complaints concern the negligence of his parole agent and the unconstitutionality of the procedure by which he was recommitted. In neither of the petitions for review does the appellant request a mandamus. Moreover, the thrust of appellant's complaints do not involve the essential allegation for mandamus—that there was a mistake in applying the law or there was a failure of the Board to act. Rather, appellant's complaints appear to be a direct attack on the constitutionality of the entire parole revocation process. *See* note 1, *supra.* Therefore, the Commonwealth Court erred in treating appellant's petitions for review as mandamus actions. Instead, we believe that Bronson was seeking a review of the revocation of his parole.

The Constitution of Pennsylvania was amended in 1968 to expressly provide for appeals to courts of record

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[5] Section 401 of the Appellate Court Jurisdiction Act has been substantially reinacted in the Judicial Code, Act of July 9, 1976, P.L. 586, No. 142, §2, 42 Pa. C.S.A. §761.

from administrative agencies. Section 9 of Article 5 of our Constitution states:

> §9. Right of appeal
>
> There shall be a right of appeal in all cases to a court of record from a court not of record; and there shall also be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law.

Since the Board of Probation and Parole is an administrative agency of the Commonwealth, the Constitution mandates that a person dissatisfied with its decisions must have the right to appeal that decision "to a court of record or to an appellate court."

Moreover, after the voters approved the adoption of Article 5, Section 9, the legislature implemented this new provision by amending the Administrative Agency Law of 1945. Act of June 5, 1945, P.L. 1388, *as amended* 71 P.S. §§1710.1-.51, *repealed* effective June 27, 1978 and *recodified* at various places in Titles 2 and 42 of the Pennsylvania Consolidated Statutes. This implementing legislation, the Act of December 2, 1968, P.L. 1135, No. 354, 71 P.S. §1710.47, was entitled:[6]

> Amending the act of June 4, 1945 (P.L. 1388), entitled "An act relating to the practice, procedure, regulations and adjudications of departments, de-

[6] It is clear that we may consider the title and preamble of a statute in construing the statute's meaning. Statutory Construction Act of 1970, *as amended*, 1 Pa. C.S.A. §1924 (1979 Pamphlet).

partmental administrative boards and commissions, independent administrative board and commissions, officers and other administrative agencies of this Commonwealth, and judicial review thereof; and preserving equitable jurisdiction in certain cases," implementing the provisions of section 9 of Article V of the Constitution of the Commonwealth of Pennsylvania by providing for a right of appeal in all cases from adjudications of administrative agencies of the Commonwealth; repealing certain provisions which restrict the applicability of the act to enumerated agencies; and repealing certain other acts and parts of acts.

It added the following provision to the Administrative Agency Law of 1945:

Section 2. The act is amended by adding after section 46, a new section to read:

Section 47. Jurisdiction of Appeals.—Where an act of Assembly expressly provides that there shall be no appeal from an adjudication of an agency, or that the adjudication of an agency shall be final or conclusive, or shall not be subject to review, or where the applicable acts of Assembly are silent on the question of judicial review, any person aggrieved by such an adjudication, who has a direct interest in such adjudication may nevertheless appeal the same in the manner provided by sections 41 through 44 of this act and the applicable Rules of Civil Procedure to the Court of Common Pleas of Dauphin County. Sections 31 through 35 of this act shall apply to all proceedings leading to an adjudication of any agency which may be appealed under this section.

Furthermore, the implementing legislation was quite clear that appeals of agency action were to be permitted henceforth:

> Section 7. All acts and parts of acts are repealed insofar as they provide that there shall be no appeal from an order, decision or other action of any agency, or that the order, decision or other action of an agency shall be final or conclusive, or shall not be subject to review.

The legislature's determination of the appropriate forum for such appeals is the Commonwealth Court. Bronson's first attempt to appeal the parole revocation was filed on June 8, 1978, and correctly asserted that the Commonwealth Court had jurisdiction to hear his appeal. Bronson's appeal was governed by the Appellate Court Jurisdiction Act of 1970. Act of July 31, 1970, P.L. 673, No. 223, §403, 17 P.S. §211.403, *repealed* by the Judiciary Act Repealer Act of 1978, effective June 27, 1978, and *recodified* at 42 Pa. C.S.A. §763 (1979 Famphlet). Section 403 stated in pertinent part:

> Section 403. Direct Appeals from Administrative Agencies. The Commonwealth Court shall have exclusive jurisdiction of appeals from final orders of administrative agencies in any of the following cases:
>
> (1) All appeals from administrative agencies of the Commonwealth under the Administrative Agency Law or otherwise and including appeals from the Pennsylvania Public Utility Commission, the Unemployment Compensation Board of Review and from any department, departmental administrative board or commission, independent board or commission or other agency or administrative officer of this Commonwealth having statewide jurisdiction except:

(i) matters relating to the privilege of operating motor vehicles or tractors, including the revocation or suspension of such privilege and matters relating thereto; and

(ii) matters authorized by The Pennsylvania Workmen's Compensation Act or The Pennsylvania Occupational Disease Act to be appealed to the courts of common pleas.

Clearly, the Board of Probation and Parole was encompassed within the mandate of section 403(1) and its reference to the Administrative Agency Law.

The legislative intention to channel direct appeals of decisions of the Board of Probation and Parole to the Commonwealth Court is continued in 2 Pa. C.S.A. §§701 & 702, and in 42 Pa. C.S.A. §763, which were in effect when Bronson attempted to seek review in the Commonwealth Court the second time.

Having concluded that appellant's action in the Commonwealth Court was not a civil action in the nature of mandamus, but rather a constitutionally guaranteed appeal from the action of an administrative agency, we must determine what right to counsel was available to him in such a proceeding. It is clear that indigent criminal defendants are entitled to state-appointed counsel to assist them in resisting the revocation of their parole. In *Commonwealth ex rel. Rambeau v. Rundle,* 455 Pa. 8, 17, 314 A.2d 842 (1973), we held that "there can be no doubt" that assistance of counsel is required at a parole revocation hearing because substantial rights of the parolee may be affected. And in *Commonwealth v. Tinson,* 433 Pa. 328, 334, 249 A.2d 549 (1969) we held that counsel is required at such a hearing and stated:

> The point is that counsel is required at the hearing before the Parole Board to insure that *that hearing* is constitutionally valid. . . . The recommitment hearing determines whether or not appellant would be returned to prison. There can be no question that a proceeding at which a determination of that kind was made a 'crucial stage' [Emphasis in the original.]

Furthermore, the rules promulgated by the Board itself recognize that a parole violator is entitled to appointed counsel at his parole revocation hearing.[7] 37 Pa. Code §71.4 (3) (ii).

Having determined that Bronson's action in the Commonwealth Court was a direct appeal from the Board's determination and that he was entitled to the assistance of counsel at his parole revocation hearing, it must follow that he also was entitled to the assistance of counsel in the prosecution of that appeal. In *Cunningham v. Maroney,* 421 Pa. 157, 159, 218 A.2d 811 (1966), we held that:

> It is settled law since the decision in *Douglas v. California,* [372 U.S. 353 (1963)], that an indigent defendant is constitutionally entitled to the assistance of counsel on an appeal as of right. Moreover, it is equally settled that a necessary incident of that right

---

[7] As we noted in the statement of facts, it is disputed in this record as to whether Bronson was represented at the revocation hearing before the Board. Although the Board in its brief asserts that Bronson was represented, there is no transcript upon which a reviewing court could determine the validity of such a finding. The *amicus* and the *pro se* briefs by Bronson maintain the contrary. Thus, an evidentiary hearing would be required to resolve the conflict. In view of our determination, we need not be concerned at this point with this problem.

> is the assistance of counsel in the task of perfecting such an appeal. [Citations omitted.]

Accord, Commonwealth ex rel. Light v. Cavell, 422 Pa. 211, 217, 220 A.2d 889 (1966). *See also,* Pa. R. Crim. Pro. 316(c)(iii). Because Bronson was entitled to the assistance of counsel during his parole revocation hearing, he is also entitled to the assistance of counsel during his direct appeal as of right to the Commonwealth Court. "We are helped not at all in determining appellant's constitutional rights by attaching artificial labels to describe the proceeding before us." *Commonwealth v. Tinson,* at 332. Whether a parole violation proceeding is properly classified as criminal, quasi-criminal or civil, we have recognized it to be a proceeding of the nature where the right to counsel is required to comport with our fundamental concepts of fairness. The same compelling considerations requires the assistance of counsel in the task of perfecting an appeal from that proceeding. Cf. *Douglas v. California,* 392 U.S. 353 (1963).

Nor can it be seriously argued that Bronson waived his right to challenge the Commonwealth Court's first ruling for failing to timely seek relief from this Court. The failure of a defendant to take an appeal "within the time allowed by law will preclude the assertion of such right *unless* the failure to do so resulted from an unconstitutional deprivation of the assistance of counsel." *Commonwealth ex rel. Cunningham v. Maroney,* at 159 (emphasis added). Since Bronson was unrepresented in that proceeding and there was no showing that he was aware of a right to seek further redress, it is clear that there has not been an effective waiver which would preclude us from giving relief at this point.

Accordingly, the order of the Commonwealth Court is reversed and the cause is remanded to the Commonwealth Court for a counseled appeal.

Mr. Justice Larsen concurs in the result.

G. LETTER ADVISING DENIAL OF PETITION FOR REARGUMENT

SUPREME COURT OF PENNSYLVANIA
Eastern District

November 17, 1980

Robert A. Greevy, Esquire
Assistant Attorney General
Pa. Board of Probation & Parole
P. O. Box 1661
Harrisburg, PA 17120

Re: Purcell Bronson, Appellant v. Comm/Pa. Bd. of Probation & Parole, et al. No. 213 January Term, 1979

Dear Mr. Greevy:

This is to advise you that the Petition for Reargument filed in the above-captioned appeal was denied by the Court on November 14, 1980.

Very truly yours,
Carl Rice, Esq.
Prothonotary
By: Catherine E. Lyden
Catherine E. Lyden
Deputy Prothonotary

CEL/fm
cc: Mr. Purcell Bronson
John W. Packel, Esquire
West Publishing Company

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980
No.

COMMONWEALTH OF PENNSYLVANIA,
PENNSYLVANIA BOARD OF PROBATION AND PAROLE,
Petitioner

v.

PURCELL BRONSON, Respondent

ANSWER TO PETITION FOR WRIT OF CERTIORARI

John W. Packel, Assistant Defender,
Chief, Appeals Division
Benjamin Lerner, Defender
DEFENDER ASSOCIATION OF PHILADELPHIA

Defender Association of Philadelphia
121 North Broad Street
Philadelphia, Pennsylvania 19107

COUNTER STATEMENT OF QUESTION PRESENTED:

Did not the Pennsylvania Supreme Court properly exercise its supervisory powers under the Pennsylvania Constitution and its role as the final arbiter of state law in directing the Commonwealth Court of Pennsylvania to appoint counsel to represent Purcell Bronson on his appeal to the Commonwealth Court of Pennsylvania?

COUNTER STATEMENT OF THE CASE:

On April 6, 1978 the Pennsylvania Board of Probation and Parole conducted a hearing to revoke the parole of Respondent Purcell Bronson. This hearing was conducted some seven months after a new conviction of Mr. Bronson, which conviction was said to constitute the violation of parole. No witnesses were called at the hearing, and no substantial record of the proceedings was kept.

Respondent Purcell Bronson, acting pro se, sought review by the Commonwealth Court of Pennsylvania, alleging that the revocation proceedings were untimely under Pennsylvania law and regulations of the Pennsylvania Board of Probation and Parole. On October 27, 1978 the Commonwealth Court granted the Parole Board's motion for summary judgment and dismissed the appeal. A copy of the Commonwealth Court's opinion is attached to the Petition for Writ of Certiorari as Appendix "A."

Respondent Bronson, still unrepresented by counsel, subsequently filed a second Petition for Review in the same court, which appeal was dismissed on January 4, 1979. See Appendix "B" to the Parole Board's Petition for Writ of Certiorari.

Subsequently, Respondent Bronson petitioned the Supreme Court of Pennsylvania for review of the Commonwealth Court's decision. Ancillary to that appeal, Respondent Bronson on July 3, 1979 filed a petition with the Supreme Court of Pennsylvania requesting the appointment of counsel. On July 9, 1979 the Supreme Court remanded the petition to the Commonwealth Court for a decision on Respondent Bronson's right to counsel.

On July 16, 1979 the Commonwealth Court of Pennsylvania denied Respondent Bronson's request for the appointment of counsel and referred the matter back to the Supreme Court of Pennsylvania. The Commonwealth Court's memorandum order (attached to the Parole Board's Petition for Writ of Certiorari as Appendix "D") was grounded on the fact that Respondent Bronson's action was a "civil action" and therefore he was not entitled to counsel under Pennsylvania statutes and Rules of Appellate Procedure.

On March 20, 1980 the Supreme Court of Pennsylvania, having granted leave of the Defender Association of Philadelphia to participate as amicus curiae and heard arguments on the issue, held that in fact Respondent Bronson's appeal to the Commonwealth Court was criminal in nature and that under the Pennsylvania Constitution, statutes and regulations, Respondent Bronson was entitled to an attorney on his appeal from his revocation of parole.

The Pennsylvania Board of Probation and Parole now seeks this Court's review of that decision, claiming, mistakenly, that

it was grounded on Federal constitutional law.

ARGUMENT AGAINST GRANTING THE WRIT OF CERTIORARI

The Pennsylvania Supreme Court properly exercised its supervisory powers under the Pennsylvania Constitution and its role as the final arbiter of state law in directing the Commonwealth Court of Pennsylvania to appoint counsel to represent Purcell Bronson and consequently the instant case presents no substantial Federal question.

Although the Petition for Writ of Certiorari characterizes the Pennsylvania Supreme Court's decision as a constitutional one, there is nothing either in the record or in the opinion to support this claim. Indeed, a review of the opinion of the Pennsylvania Supreme Court in this case clearly discloses that the decision is based solely on questions of state law and procedure. The Parole Board's Petition for Writ of Certiorari claims that the Pennsylvania Supreme Court "relied exclusively on Douglas v. California, 372 U.S. 353 (1963), which held that an indigent criminal defendant has a federal right to appointed counsel on his first appeal as of right from his conviction." Although Douglas was cited by the Pennsylvania Supreme Court in its opinion (and is in fact the only arguable federal constitutional reference in the opinion), the Douglas cite was not a direct one but came only after the drawing of an analogy between allowing counsel on a direct appeal and allowing counsel on a parole revocation appeal. It is particularly significant that this citation in the text of the Supreme Court's opinion (Parole Board's Petition for Writ of

Certiorari, Appendix "F", R21a) is preceded by the signal "Cf." The uniform system of citation indicates that a "Cf." cite means that "cited authority supports a proposition different from that in text but sufficiently analogous to lend support. Literally, 'cf.' means 'compare.' 'Cf.' should not be used without an explanatory parenthetical."

Not only can it be said that the Pennsylvania Supreme Court's decision in this case is based on an adequate and independent non-federal ground, but in fact there is nothing in the opinion to even warrant the conclusion that it was compelled in part by any Federal constitutional principle.

In the absence of a significant Federal question, it is requested that this Court deny the Petition for Writ of Certiorari in the captioned matter.

CONCLUSION

For the reasons set forth above this Court should deny the Petition for Writ of Certiorari filed by the Pennsylvania Board of Probation and Parole.

Respectfully submitted,

JOHN W. PACKEL
BENJAMIN LERNER
DEFENDER ASSOCIATION OF PHILADELPH
Counsel for Purcell Bronson

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980
No.

COMMONWEALTH OF PENNSYLVANIA,
PENNSYLVANIA BOARD OF PROBATION AND PAROLE,
Petitioner

v.

PURCELL BRONSON, Respondent

PETITION TO PROCEED IN FORMA PAUPERIS

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent, Purcell Bronson, by his counsel, the Defender Association of Philadelphia, request permission to proceed in forma pauperis and represents:

1. Purcell Bronson is and has been for some years an inmate of the Pennsylvania State Correctional Institutions and is without any significant or substantial funds with which to prosecute this appeal.

2. In fact, the Supreme Court of Pennsylvania in the order which the Parole Board now seeks to have reviewed directed that counsel be appointed to represent Mr. Bronson because he was an indigent. To this day the Pennsylvania Board of Probation and Parole has failed to comply with that order of the Supreme Court of Pennsylvania, despite the fact that it was filed on March 20,1980.

3. The Defender Association of Philadelphia, which now seeks leave to proceed in forma pauperis on behalf of Respondent Bronson was permitted to enter its appearance and present argument on Mr. Bronson's behalf as amicus curiae in the Supreme Court of Pennsylvania. The Defender Association of Philadelphia is a private, non-profit corporation charged with the specific responsibility of protecting the interests of indigent criminal defendants in Philadelphia County, Pennsylvania.

4. On the failure of the State Parole Board to appoint counsel on behalf of Mr. Bronson as directed by the Supreme Court of Pennsylvania almost a year ago, the Defender Association of Philadelphia accepts its obligation to proceed with this matter but does request that it be permitted to proceed in forma pauperis.

WHEREFORE, this Court is requested to allow the Defender Association of Philadelphia to proceed in forma pauperis in its representation of Respondent Purcell Bronson.

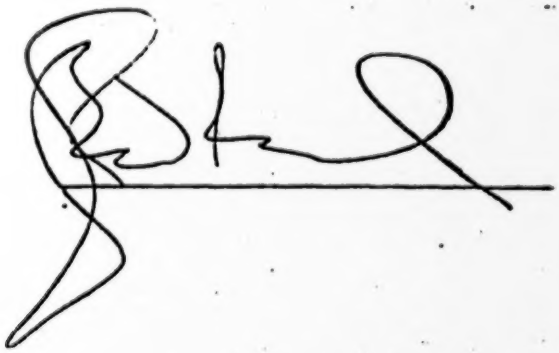
Respectfully submitted,

JOHN W. PACKEL
BENJAMIN LERNER
Defender Association of Philadelphia

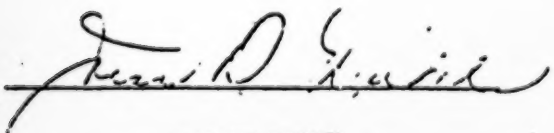
COMMONWEALTH OF PENNSYLVANIA :
: ss
COUNTY OF PHILADELPHIA :

AFFIDAVIT

John W. Packel, being duly sworn according to law, deposes and says that the facts set forth in the foregoing petition are true and correct to the best of his knowledge, information and belief.



Sworn to and subscribed
before me this 10 day
of March, 1981



JOANN D. WEIKEL
Notary Public, Phila., Phila. Co.
My Commission Expires Oct. 9, 1982